

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE  
DIVISION I

STATE OF TENNESSEE

VS.

PERRY AVRAM MARCH

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CASE NO: 2004-D-3113

FILED

JUL 24 Rec'd

DAVID C. TORRENCE  
CLERK

**ORDER**

**I. Introduction**

This matter came before the Court on July 7, 2006 upon defendant's "Motion to Exclude Evidence of Defendant's Communications with Jailhouse Informants." Having reviewed the motion and having heard from counsel, the Court finds the motion is not well taken and is hereby DENIED.

**II. Background**

On December 8, 2004, a sealed indictment was returned against the defendant by a Davidson County Grand Jury.<sup>1</sup> As a result, the defendant was taken into custody in Mexico on August 3, 2005 and placed in the Los Angeles County Jail. On August 12, 2005, the defendant was transported from Los Angeles to Nashville and placed in the Metropolitan Nashville Justice Center in the Special Management Unit. The defendant was arraigned on August 17, 2005. Since arraignment, the defendant has been represented by counsel on the charges stemming from the sealed indictment.

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<sup>1</sup> In addition to the current case, the defendant was indicted for theft of property over \$10,000.00 and received a separate jury trial on those charges.

While housed in the Justice Center, the defendant became acquainted with Russell Nathaniel Farris, who was housed in the cell next to defendant. According to testimony and evidence previously heard by this Court in the defendant's trial on conspiracy charges, the two men began to talk on a regular basis. At some time later, Lawrence Levine received a call from a female who told him her son had information about the Janet March case. Levine took the telephone number and passed it along to the District Attorney's Office. Upon investigation, the District Attorney's Office learned that the female who had given the information was the mother of Russell Nathaniel Farris.

Ms. Farris informed the District Attorney's Office she had information that the Levines were in danger. She indicated the defendant and her son had engaged in conversations about a plan to kill the Levines. However, she explained that her son wanted to withdraw from the plan but that he feared the Levines might be killed by someone else and he would receive the blame. In response the District Attorney spoke with Farris' counsel about the possibility of a meeting between them. The District Attorney met with Farris and learned of the discussions between Farris and March about a plot to have Farris kill the Levines.

Once the District Attorney learned Farris desired to abandon or withdraw from such a plan, they requested that he wear a wire in his cell to record conversations with March about the purported plan. According to his testimony at trial, Farris was not promised leniency in return for his efforts. To that end, Farris was wired and recorded conversations with March about the conspiracy to kill the Levines. Those tapes were played at the conspiracy trial.

### III. Discussion/Analysis

In his motion, the defendant moves to exclude from evidence any and all communications between the defendant and Russell Nathaniel Farris.<sup>2</sup> Citing generally the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 8 and 9 of the Tennessee Constitution, Tennessee Rules of Criminal Procedure 12(b) and 47 and Tennessee Rule of Evidence 408, the defendant specifically claims the communications (and recordings thereof) violated his right to counsel pursuant to State v. Berry, 592 S.W.2d 553 (Tenn. 1980) and Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

It is well settled that a defendant has a Sixth Amendment right to counsel after the time judicial proceedings have been initiated against him. Once this right has attached and has been asserted by a defendant, the state must honor it and not act in a manner that circumvents or dilutes the protection afforded by the right to counsel. See Maine v. Moulton, 475 U.S. 159 (1985).

In Massiah v. United States, 377 U.S. 201 (1966), the United States Supreme Court held that Massiah's right to counsel had been violated when his co-defendant, acting as a police agent "deliberately elicited" evidence from the defendant relating to the pending trial. Id. at 206. Similarly, in Moulton, supra, the Supreme Court concluded that Moulton's sixth amendment right to counsel was violated upon the admission of incriminating statements made by the defendant to the co-defendant. Id. at 181 (co-defendant pled guilty and agreed to tape record conversations between the defendant and co-defendant about strategy on the pending case). The same result was reached in United State v. Henry, 447 U.S. 264 (1980). In Henry, the Court held that the

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<sup>2</sup> As noted above, this Court heard the tape recordings and the circumstances under which the tapes were recorded during the defendant's conspiracy trial in June. Although the defendant initially challenged their admission in that trial, he eventually withdrew his motion. However, he renews the motion in the instant case again citing Massiah and its progeny.



Government violated Henry's Sixth Amendment right to counsel "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel." Id. at 274 (defendant made statements to a fellow inmate who was an undisclosed paid informant acting under the direction of the government).

The common theme of these cases is that when an accused has been charged with an offense he has a Sixth Amendment right to counsel. This right is violated when a government informant/agent elicits incriminating responses from the accused about the charged offense. Such evidence is inadmissible against a defendant. However, in the present case, the incriminating statements elicited by Russell Nathaniel Farris related to conspiracy and solicitation charges and not to the indicted charges for which the defendant was incarcerated and had secured counsel.

In Texas v. Cobb, 532 U.S. 162 (2001), the Supreme Court held that the Sixth Amendment right to counsel was "offense specific." In Cobb, the defendant was indicted on a burglary charge after confessing to the crime. Counsel was appointed to represent the defendant and thereafter defendant was released on bond. While out on bond, the defendant confessed to his father that he had killed a woman and her child during the burglary. Defendant's father reported the confession to the police, who took the accused into custody. After being given his Miranda warnings, the defendant confessed to murdering the woman and her daughter. On appeal the defendant claimed the confession should have been suppressed because it had been taken in violation of his Sixth Amendment right to counsel. The Texas Court of Criminal Appeals reversed the conviction finding that the murder charge was factually interwoven with the burglary charge; and therefore, (1) the right to counsel had attached on the murder charge when the police took the accused into custody even though he had not yet been charged with the offense; (2) the accused had asserted this right by accepting the appointment of counsel in the burglary charge; and (3) the accused's murder confession

was inadmissible at trial.

The United States Supreme Court reversed finding that (1) the Sixth Amendment right to counsel (a) is “offense specific.” and (b) therefore does not necessarily extend to offenses that are “factually related” to those that have been charged; and (2) the Sixth Amendment did not bar the police from interrogating the accused concerning the murders because (a) when the accused confessed to the murders, he had been indicted for the burglary but had not been charged in the murders and (b) as defined by Texas law, burglary and capital murder were not the same offense. Id. at 174. In other words even though the Sixth Amendment right had attached to the burglary offense for which the defendant had formally been charged, the right had not yet attached to the related but not yet charged offense of murder of two victims during the burglary.

The Tennessee Court of Criminal Appeals reached a similar result in State v. Tony Wayne Snyder, No. 03C01-9403-CR-00101, 1995 Tenn. Crim. App. LEXIS 927 (Tenn. Crim. App. filed Nov. 21, 1995, at Knoxville). In Snyder, the defendant, after being advised of his Miranda rights, confessed to aggravated arson and conspiracy to commit first degree murder. He was charged with those charges along with a theft charge. While awaiting trial on the arson and related charges, an inmate at the detention center told an officer the defendant had asked him to commit perjury by testifying that the officer had coerced the confession. The inmate also claimed the defendant had made threats against the officer, the officer’s family and others. The officer made arrangements for the inmate to record his conversations with the defendant. In one of the conversations, the defendant offered the inmate three packs of cigarettes and two dollars to testify falsely. In another recording, the defendant offered the inmate three cigarettes and forty cents. Id. at \*4-\*5.

The Snyder court, per Judge Wade, acknowledged that the defendant’s right to counsel had attached as to the charged offenses but that the right had not yet attached to the subornation of

perjury charge because no adversarial proceedings had been initiated. Id. at \*6. The Court added that “[t]he mere fact that a defendant has the right to counsel on one charge, does not mean that the right has attached for all other crimes for which the defendant might be charged. Id. at \*7 (citations omitted).

The Snyder court further summarized the issue as follows: “[b]ecause the defendant’s Sixth Amendment rights attached as to the charged offenses, but not as to the attempt to suborn perjury, we must determine what evidence of the defendant’s attempt to suborn perjury, if any, was properly admitted without infringing upon his Sixth Amendment rights as to the initial charges.” Id. It first recognized that if the defendant had made incriminating statements in the recordings about the aggravated arson, the first degree murder conspiracy or the theft (the charged offenses), those remarks would have been inadmissible. Id. at \*8 (citing Massiah). However, it noted the inquiry before them necessarily required them to determine whether evidence of a separate crime would be admissible in the trial on the prior charges wherein the Sixth Amendment right had already attached.

Finding no guidance from Mouton, the Snyder court looked at decisions in other jurisdictions where those courts, applying the “separate offense” exception of Hoffa v. United States, 385 U.S. 293 (1966), found no Sixth Amendment violation when the incriminating evidence related to a crime separate from the charged offense. Id. at \*9-\*10. Applying their analysis to the instant case, the court in Snyder noted the tape-recorded statements of the defendant did not include any information about the charged crimes. The purpose of the “wire,” it found, was to corroborate evidence of his attempt to get the inmate to testify falsely. It held “the admission of the statements, evidence of the defendant’s guilt of a separate offense, did not compromise his right to counsel on the initial charges.” Id. at \*10.



Applying the reasoning of Cobb and Snyder to the present case, this Court reaches the same conclusion drawn by those courts. Here, the defendant had been charged under a sealed indictment and had secured counsel. Clearly, his Sixth Amendment right to counsel had attached and had been asserted as to those charges. While incarcerated, the defendant became acquainted with Russell Nathaniel Farris. According to the proof adduced at the conspiracy trial, Farris and defendant developed a plot to kill the Levines, who would be witnesses in the trial on the sealed indictment charges. At some point Farris decided to abandon the plan. Thereafter, he disclosed the plan to his mother and his related fears of being charged. Subsequent communication with the District Attorney resulted in Farris' agreement to wear a "wire" to record his conversations with the defendant. The incriminating responses related to the conspiracy to kill the Levines and solicitation.

The tape recordings were played during the defendant's trial on the conspiracy and solicitation charges. From this previous trial, the Court can conclude that the purpose of the Farris tape recordings was to corroborate his earlier statements to the authorities regarding the plan to kill the Levines and not to elicit incriminating statements about the second degree murder and related charges (per the sealed indictment).

Based on the holdings of Cobb and Snyder and related cases cited therein, this Court concludes that the challenged tape recordings relate to an offense or offenses other than the indicted offense ("separate offense") for which the defendant had asserted his right to counsel. Accordingly, they were not obtained in violation of the defendant's Sixth Amendment right to counsel.<sup>3</sup>

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<sup>3</sup> Statements made to any witness after the defendant's right to counsel has attached but before any state involvement are not subject to constitutional requirements since there has been no state action. See Hartman v. State, 896 S.W.2d 94 (Tenn. 1995). This conclusion would apply to any relevant statements made to Mr. Farris prior to being "wired" and any relevant statements made by the defendant to Mr. Martin.

As in Snyder, the defendant may have other issues related to the admissibility of the tape recordings pursuant to Tennessee Rules of Evidence 401, 403 and 404. The Court's ruling in the present Order does not preclude such challenges.

#### IV. Conclusion

For the reasons cited herein, the defendant's motion to exclude evidence of defendant's communications with jailhouse informant(s) is hereby DENIED.

ENTERED this the 24<sup>th</sup> day of July, 2006.

  
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Hon. Steve R. Dozier, Judge  
Division I

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